Supreme Court of the Hawaiian Islands--In Equity. In Banco. July Term 1886.

EMMA BECKLEY VS. FRANK METCALF, ET ALS.

BEFORE JUDD, C. J., M'CULLY AND PRESTON, J. J.

Opinion of the Court by PRESTON, J.

On appeal from the Chancellor.

The nature of the case appears in the following decision of the Chancellor which is appealed from.

This is a bill in equity alleging substantially that plaintiff is the daughter and sole heir-at-law of Theophilus Metcalf, who deceased in August, 1866, leaving real and personal estate in this Kingdom which he disposed of by will duly admitted to probate: that under the directions of the will all the real and personal property devised and bequeathed to plaintiff was sold to pay the debts due from the estate of the testator and no part remained for distribution to the plaintiff: that a specific devise of certain real estate (fully described in the bill) was made in the said will to Frank Metcalf, defendant, for life with remainder to his surviving children and on failure of issue, to defendants Helen Rowland and Julia Prosser: that defendant Frank Metcalf has minor children, named in the bill: that plaintiff, though the sole lawful heir of Theo. Metcalf, was by reason of the carrying out of the said will and the sale of all the property devised to her to pay testators debts, deprived of every part of the property or interest in the property belonging to her father at the time of his decease: plaintiff married in 1867 and remained under coverture till 1881 when her husband died and she has not married since: that on the 14th of October, 1885, the interest of Frank Metcalf in the lands devised to him as above set forth, was sold at public auction to Andrade, Hayselden, Kidwell and Henson, defendants, and another parcel on Beretania street was previously sold by F. Metcalf as administrator *de bonis non* of T. Metcalf, to L. Asen defendant: that these sales except the last were without validity to pass the fee as Frank Metcalf had only a life interest in the same. The bill prays for the appointment of a guardian *ad litem* for the minor respondents and that such share of the property devised and bequeathed to Frank Metcalf be awarded to plaintiff as to the Court shall seem equitable, etc.

The attorney *ad litem* has filed a demurrer and plea and the other defendants have either demurred or answered.

These demurrers raise the question whether, since the specific devise of the plantation of Kaupakuea to the plaintiff was charged with the payment of the testator's debts and the same sold for this purpose, the plaintiff as specific devisee, is entitled to exoneration out of the lands devised to the other specific devisees.

I have searched the books in vain to find authority to sustain the view contended for in the bill. I think the right of a specific devisee to marshal the assets as against the heir of the descended estate is clear, following the general rule that assets are to be applied in the following order, (first) the personal estate, not expressly nor by implication exempted; (second) lands specifically devised to pay debts; (third) estates descended to the heir; (fourth) devised land, charged with the payment of debts generally; (fifth) general pecuniary legacies pro rata; (sixth) specific legatees pro rata; (seventh) real estate devised, whether in terms general or specific.

2 Leading cases in Equity, 396.
Hays vs. Jackson, 6 Mass., 149.

But I am unable to find a case where, the personal estate having been first exhausted and the real estate specifically devised and charged with the payment of debts generally being next taken for this purpose and sold and the debts discharged, that the devisee of this portion of the estate has the right to be reimbursed from the portion of the other specific devisees.

For this reason I think the demurrer should be sustained.

The other points made I have not considered, as being unnecessary.

In support of the appeal Mr. Neumann contended (*inter alia*) that under established rules it is not sufficient that one part of the estate should be charged (*with the debts*) and all the rest exonerated unless such exoneration is stated in the will in express terms. Story's Eq. Jur. 572, 573 and 574.

This is not the case here. By this will, T. Metcalf under the impression evidently that he had devised the most valuable part of the estate to the plaintiff charged not only the debts but also legacies upon the proceeds of the estate devised to plaintiff.

Counsel further contended that nearly all the adjudged cases go to the extent that the charge of debts upon a specific devise does not imply an exoneration of the other portion of the estate unless there is an express provision for such exoneration.

A part of the residue of the estate, Mr. Neumann urged, is in the same position in which it was when the will went into effect, that part at least should be made to contribute, in proportion to make good in a measure the loss of her entire inheritance to the heir.

Counsel also contended that although there might be no direct authority for the granting of the relief sought, still no case could commend itself more strongly to a favorable consideration by a Court of Equity.

Story's Eq. Jur. 568, 568a and 570 and cases there cited. Redfield on wills, p. 365, note 33, 3rd ed.

BY THE COURT.—If by the "residue of the estate" is meant the residuary estate devised by the will, the plaintiff has not claimed to be exonerated therefrom by her Bill, neither has she made the residuary devisees (the Trustees of Oahu College) parties and therefore, we cannot consider whether she is entitled to be so exonerated.

If plaintiffs' counsel only means the lands devised to the defendant Frank Metcalf, then the point is covered by this decision.

The contention made by the plaintiffs' counsel that the intention to exonerate should be stated in the will in express terms, is too broad. It is sufficient if "a manifest intention" appears (Story's Eq. Jur. 571.) and we think such a manifest intention is apparent in this will.

The plaintiff has failed to convince us that, there is any authority to support the claim set up by the bill or that the decision appealed from is incorrect.

We therefore affirm such decision and dismiss this appeal with costs.

P. Neumann for plaintiff: J. A. Magoon for minor defendants and Mrs. Prosser; Ashford and Ashford for other defendants.

Honolulu, July 30th, 1886.

Supreme Court of the Hawaiian Islands--In Banco July Term. 1886.

GEO. H. LUCE, TAX COLLECTOR OF HONOLULU VS. CHIN WA ET AL.

BEFORE JUDD C. J. AND M'CULLY AND PRESTON J. J.

Opinion by M'CULLY J.

In the Police Court of Honolulu, the defendants were defaulted for non-appearance on the return day, and hour, and upon proof, on the plaintiff's part, judgment was entered for the plaintiff.

The defendant later in the day, took an appeal from this judgment.

On appeal, the Intermediary Court held that an appeal did not lie from a judgment by default, and and appeal was taken up to the Court in banco.

This is the question now submitted to this Court. This involves the construction to be given to the phrase in Sec. 1005: "Any party deeming himself aggrieved by the decision of any police or district justice in any case, whether civil or criminal, may appeal, etc." Section 835 provides, that, the summons shall contain a notification to the defendant, that, if he fails to attend at the time and place of trial designated, judgment will be rendered against him *ex parte* by default. The affidavit of defendant's counsel, presented in the Intermediary Court sets forth, that, on the day set for the trial of the cause, he attended at the Police Court a few minutes after nine o'clock a. m. That, on his reaching the Court room, the Police Justice had called this case, before calling the criminal docket, which was contrary to the rules of the Police Court, and had already entered judgment for plaintiff herein, entering no appearance for defendant; That the affiant asked that the judgment be vacated and the case tried on its merits; stating that defendant had a meritorious defence; That the Police Justice replied, that plaintiff herein had not time to attend the trial and that an appeal to the (Intermediary) Court, would give defendant opportunity to set up his defence.

From the affidavit we infer that due service had been made on the defendant, that the case was within the jurisdiction of the Police Court, that the complaint was not defective, and that no motion to remove default was made or denied. The case of Halleck vs. Jandin, 34 Cal. 167, is much relied on to support the appellant. The language of the Court is, that, "as to the right of appeal, there is no distinction between judgments by default, and judgments after issue joined, and a trial. The former is as much a final judgment as the latter, and the statute gives a right to appeal from all final judgments without distinction. From this it follows, that all errors disclosed by the record can be reviewed, and corrected on an appeal from the former class of judgments, as well as the latter."

The Court in this utterance supports itself by no authority. It is in contravention to the current of previous judicial findings of the same State, but it does not express itself as overruling them. Mr. Justice Field, then Chief Justice Field, says in Mott vs. Smith, 16 Cal. 535, "To entitle objections to consideration here, they must be presented to the Court below in the first instance, at least, if they are of a character which might have been then obviated by the production of other evidence."

In Guy vs. Ide, 6 Cal. 99, the Court say, "when a remedy is so perfectly attainable in the Court of original jurisdiction, an appellate Court will not administer it, for any cause that can be assigned."

The case of Holman vs. Sigourney, 11 Met. 496, and Ball vs. Burke, 11 Cush. 80, more explicitly support the appellant's contention. The revised statute of Mass. amended the old statute by striking out the words, "in which any issue has been joined;" and the Court in these cases held that appeal lay from a judgment on default and for nonsuit. A reason given is that the judgment upon a default may be for a sum too large or too small, or may be rendered for causes of action not embraced in the Court, matter which may be corrected upon an appeal. The Massachusetts Courts are bound by the express Legislative interpretation given to the statute by the amendment, and the Commissioners' notes indicating that purpose.

Upon reason, it is not satisfactory to hold, that, a party by merely suffering a default in the Court of original jurisdiction, may in the form of an appeal, take his case for trial before the appellate Court. The theory of appeal is to afford a retrial in a superior tribunal, which may correct errors of law, and findings of fact, as made in the lower Court. The plaintiff has a right to a trial upon issue joined in the original Court. If judgment is then rendered against him, he may choose to proceed no further, and risk no increase of costs. If the defendant, being duly summoned, does not appear he seems to plead *nolo contendere*. He consents to a judgment for the plaintiff if he can make his case ex parte.

Until the default is removed, it is as complete when first ordered, as if the defendant did not appear at any time thereafter. The reasons, if, any exist for the removal of a default, should be presented to the Court which has ordered it. Under the appellant's claim of appeal, a default may be suffered without danger. The jurisdiction of the Court, to which the defendant is legally summoned may be ousted in every case. We cannot hold, even upon the authorities cited, that this is a reasonable construction of the statute. A line of New York authorities support the view that an appeal does not lie from a judgment rendered on default.

In Dorr vs. Birge, 8 Barb. 351, the reasoning of the Court is, "the jurisdiction of this Court is only appellate. It can only review the decisions of the County Court. If a party to the appeal to the County Court may suffer a default and there and then appeal to this Court it would be equivalent to appealing in the first instance directly from the judgment of the justice of the peace to this Court."

Gelston vs. Hoyt, 13 John. 561, is strong authority for this view: other authorities are

Sands vs. Hildreth, 12 John. 493.
Harvey vs Cuyler, 17 John. 469.
Colder vs. Knickerbocker, 2 Cowen 31.

In 20 John. 283, Adams vs. Oaks, the language of the statute gives an appeal to "every person who shall think himself aggrieved by any order of any Justice."

The Court per Nott J., say: "to allow the defendant by suffering a default to pass by the Justice's Court, "would prevent the right of appeal which implies an actual previous litigation in the tribunal appealed from. It would convert the appellate Court into one of original jurisdiction. A judgment by default for want of appearance, is, for this purpose, equivalent to a judgment on confession." In the view which we adopt an appeal is not to be allowed in this case.

A. Rosa for the plaintiff; W. R. Castle and H. E. Avery for the defendant.

Honolulu, July 31, 1886.
